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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 645.

ARKANSAS LOUISIANA GAS COMPANY, *Appellant*,

v.

DEPARTMENT OF PUBLIC UTILITIES, THOMAS FITZHUGH, H. W. BLALOCK AND MAX H. MAPLEDORAM, COMMISSIONERS, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANT

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PAGE

INDEX

INDEX—(Continued)

Page

CASES CITED

STATUTES

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BRIEF FOR APPELLANT

OPINION OF THE SUPREME COURT OF ARKANSAS

The opinion of the Supreme Court of Arkansas has not yet appeared in the bound volumes of the reports of that Court. It will be found in the Arkansas Law Reporter, Volume 63, No. 8, at page 386, and in 108 S. W. (2d) at page 586.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked have been set out in the Statement as to Jurisdiction heretofore filed by appellant in compliance with Section 1 of Rule 12.

STATEMENT OF THE CASE

The production properties and pipe line system through which gas is transported from Louisiana and delivered into Arkansas by appellant were in 1928 acquired by Bethany Oil & Gas Company, a Delaware corporation, which was authorized under its charter to produce and acquire natural gas, and only under special contracts entered into for that purpose to sell such gas to such selected industries and public utilities as it might from time to time elect, but not to itself be or become a public utility or engage in the sale of gas to the public generally (Transcript of Record, pp. 94, 95). In December, 1928, that company obtained a permit to do business in Arkansas and at the same time changed its corporate name to Arkansas Louisiana Pipe Line Company. It was never granted by the State of Arkansas or any of its political subdivisions a license, franchise or permit to function as a public utility or to sell gas to the inhabitants of any city or district. Its main offices were in Shreveport, Louisiana (Transcript of Record, p. 95).

All of the gas transported by Arkansas Louisiana Pipe Line Company into Arkansas was sold and delivered either to local distributing corporations distributing gas at retail in cities or towns, or to selected industrial customers along and near the transmission pipe line, in the manner and upon the terms hereinafter set out. The company did not engage in Arkansas in the sale of gas locally to the inhabitants of towns, cities or other communities (Transcript of Record, pp. 95, 96).

On November 30, 1934, Arkansas Louisiana Pipe Line Company was merged with Southern Cities Distributing Company and the name of the merged corporation was changed to Arkansas Louisiana Gas Company (the appellant) (Transcript of Record, p. 100).

Southern Cities Distributing Company was the owner of a large number of gas distributing properties or plants

in Arkansas through which it distributed gas locally and at retail to the inhabitants in many cities and towns. After the merger Arkansas Louisiana Gas Company, in addition to the production and pipe line properties of the former Arkansas Louisiana Pipe Line Company, became the owner of the distribution properties or plants of the former Southern Cities Distributing Company. In September, 1935, Arkansas Louisiana Gas Company acquired additional distribution properties from Arkansas Natural Gas Corporation (Transcript of Record, pp. 100, 101).

Accordingly, Arkansas Louisiana Gas Company owns and operates the production and pipe line properties of the former Arkansas Louisiana Pipe Line Company and also owns and operates some 55 local distributing plants in Arkansas (acquired from Southern Cities Distributing Company and Arkansas Natural Gas Corporation) through which it distributes gas locally and at retail in towns and cities in Arkansas (Transcript of Record, pp. 100, 101, 135). In connection with its local distributing plants there are also served in Arkansas some 300 rural consumers, to be described presently. The production properties of the company are in Louisiana, where it produces and purchases the gas in question in this case, and the pipe line system extends from Louisiana into Arkansas. The entire system comprises about 1,500 miles of transmission pipe, the Arkansas portion of which is shown on the map appearing as page 136A of the printed record. The gas is transported from Louisiana into Arkansas by means of natural pressure from the wells aided by compressor stations, and is not treated in any manner after it leaves the State of Louisiana (Transcript of Record, p. 95).

Subsequent to the merger above referred to, Arkansas Louisiana Gas Company continued to handle, and still handles, the production and transmission of gas in the same manner that it was handled prior to December, 1934, by Arkansas Louisiana Pipe Line Company. This part of the business is handled in a separate and distinct department.

The distribution plants owned by the company in Arkansas are administered and handled through a separate distribution department which is in no way connected with the pipe line operations (Transcript of Record, pp. 100, 101).

As above stated, Arkansas Louisiana Pipe Line Company sold gas only (1) to local distributing corporations distributing gas at retail through distributing plants of their own in cities and towns in Arkansas, and (2) to selected industrial customers adjacent to and near the main transmission pipe line. These customers are known in the record as "pipe line industrial customers," and Arkansas Louisiana Gas Company sells and delivers gas to them in precisely the same manner and upon the same terms as did Arkansas Louisiana Pipe Line Company. They consist of two local distributing corporations, one of which owns the distributing plant at the City of Hot Springs, Arkansas, and the other of which owns the distributing plant at Camden, Arkansas, and of approximately forty industrial plants located along and adjacent to the company's transmission pipe line (Transcript of Record, pp. 136, 190). Originally the distribution plant in the City of Little Rock was owned and operated by a local distributing corporation, but during the pendency of the proceeding before the Department of Public Utilities that plant was acquired by Arkansas Louisiana Gas Company and is not involved in this case (Transcript of Record, p. 15).

Prior to the institution before the Department of Public Utilities of the proceeding out of which this litigation grows, and during its pendency before the Department, Arkansas Louisiana Gas Company in compliance with the Department's General Order No. 13 filed schedules showing charges for all natural gas sold and delivered in Arkansas except that delivered to the local distributing corporations and industrial customers above described and known as "pipe line industrial customers" (Transcript of Record, pp. 15, 186, 187). The only issue involved in this case is, accordingly, the power of the Department to regulate sales

to the pipe line industrial customers, and at this point we describe the manner in and the terms upon which such sales are made.

As stated, the business involved is the transportation and sale of gas produced and purchased in Louisiana (1) to local distributing corporations at the Cities of Hot Springs and Camden, Arkansas, and (2) to some forty industrial customers having plants along and adjacent to the company's main transmission pipe lines in Arkansas, whose plants are located in rural territory beyond the limits of any town or city (Transcript of Record, pp. 101, 192, 214). The gas sold to these customers is in each case sold and delivered on the basis of a special written contract between appellant and the customer, each of which contracts was entered into prior to the delivery of any gas to the customer (Transcript of Record, pp. 95, 96). Copies and abstracts of certain of these contracts which are typical appear in the Transcript at pp. 140 to 184. Under their terms, generally speaking, the company agrees to sell and the customer agrees to buy for a certain fixed period all of the customer's fuel requirements, at a certain stated price or schedule, the contract providing the maximum amount of gas the company agrees to deliver and the minimum that the customer is required to purchase or pay for. The contracts also cover such details as the pressure at which the gas is to be delivered to the customer, terms regarding meter readings, billings, etc. The contracts are executed at the general offices of the company in Shreveport, Louisiana, and the bills for gas delivered thereunder are payable at Shreveport (Transcript of Record, pp. 95, 96, 99, 105).

Appellant does not undertake to serve all industrial customers applying to it. It selects such customers and serves only those who are adjacent and within economic reach of its pipe lines (Transcript of Record, p. 101). With the purchasers it is a question of price and desirability of gas as compared with the cost and desirability of competitive fuels (Transcript of Record, p. 96), and with appel-

lant it is a question of the price that the industry can pay, the volume of gas that it will require, the duration of the contract and the profit to the company (Transcript of Record, p. 97).

The gas is delivered and discharged into the distribution systems of the local distributing corporations and into the pipes of the industrial customers direct from the transmission lines of the pipe line company (Transcript of Record, p. 95), or through a spur constructed for that purpose from the transmission pipe line to the premises of the customer, the point of delivery being at the outlet side of the company's meter (Transcript of Record, p. 184), where the gas is taken into the distribution systems of the local distributing corporations and into the pipes of the industrial customers. The gas is not treated in any manner after it leaves the State of Louisiana (Transcript of Record, p. 95), except for the reduction of pressure incident to and necessary to permit of its being passed through the meter into the customer's pipes. At each such point of delivery it is, of course, necessary to maintain a meter for the measurement of the gas and a regulator for the purpose of reducing pressure.

In the State of Louisiana appellant maintains in its employ gas dispatchers who are responsible for the anticipation of the customers' requirements (Transcript of Record, p. 102). It is necessary, especially in winter, for these dispatchers to anticipate the requirements for 24 hours or more. Contract customers contract to purchase a certain quantity of gas to be delivered over the period of their needs, and requirements may vary from day to day. These requirements are usually transmitted to the dispatchers in such a way that they may be anticipated. The amount of gas handled through the system is carefully checked and tabulated by the dispatching department so that at the end of every day they know the volume of gas that is handled and where it went (Transcript of Record, pp. 102, 103). The dispatchers control the amount of gas transmitted into

Arkansas day by day and the control comes from the requirements of the customers (Transcript of Record, p. 104). The dispatchers control the delivery to various points of the line. They are exceedingly familiar with the company's contracts with its pipe line and industrial customers, and in estimating the amount of gas to be dispatched into Arkansas they take into consideration the contract requirements (Transcript of Record, p. 105). When an individual customer of any size has been off of the line temporarily he is required to give notice before coming back on so that the dispatchers can put back into the lines the necessary gas for delivery to him (Transcript of Record, p. 102). All of the large customers are individually supplied in that careful estimates are made in advance and gas is supplied for their use. These estimates are necessary so that the needs of the customers can be anticipated and sufficient gas purchased or produced therefor. The gas is not put into the pipe line and drawn out at random (Transcript of Record, p. 78).

The gas starts at the purchase and production points in Louisiana and travels in a continuous stream to each one of the customers in Arkansas (Transcript of Record, pp. 77, 78), where it is diverted into the taps serving the various customers (Transcript of Record, p. 78). There cannot be more than 50 million cubic feet of gas in the entire system, and it is never stagnant or lying still at any meter. Throughout the transmission system it is never still (Transcript of Record, p. 79), but is continually in motion until delivered to the meters of the customers and to the distribution plants (Transcript of Record, p. 104). No gas comes to rest or is stored in the transmission lines (Transcript of Record, p. 104).

We have described appellant's operation in the transportation and sale of gas to its pipe line industrial customers. This operation is handled through its pipe line and production department. Through its distribution department appellant is engaged as a public utility in the local

sale and distribution of gas in some 55 towns and cities in Arkansas (Transcript of Record, p. 135), and in connection with the operation of these local distribution plants it is engaged through its distribution department in the sale and distribution of gas to approximately 300 so-called rural customers (Transcript of Record, p. 135). The pipe line system in Arkansas consists of lines A, H and K, running from Louisiana into Arkansas, and of line E which connects lines H and K with line A (Transcript of Record, p. 136A). There are upon these lines a total of 383 taps in Arkansas. Of these 42 are used to deliver gas to the "pipe line industrial customers" consisting of the two local distribution corporations at Hot Springs and Camden, and of the 40 industrial customers above described (Transcript of Record, p. 136); 55 are used to supply the local distribution plants maintained by appellant in the cities and towns of Arkansas which it serves, and 186 are used to supply the rural domestic customers (Transcript of Record, p. 136). The other 100 taps are not assigned and although possibly used in the past are not in use (Transcript of Record, pp. 136, 190).

In the same category with the 55 cities and towns locally served by appellant with gas, falls the service to the 318 rural domestic customers. Adjacent to and around, but without the corporate limits of, every town or city served by a local distributing plant owned by appellant, there live a number of persons or families who while not within the municipality are entitled to gas service. The custom has accordingly grown up of serving these people on the same basis as consumers living within the corporate limits of the adjacent town. They are permitted to make application to the local distributing plant, and upon the application of the latter appellant's pipe line department makes a tap on the transmission line and sets a meter (Transcript of Record, pp. 72, 73). In all such cases the gas flowing through the meter is charged to the local distributing plant. The customers (known as rural domestic

customers) become the customers of the local plant, just as are the consumers living within the limits of the adjacent municipality, and the local distributing plant bills and collects from them (Transcript of Record, p. 73). The rural customers are treated as customers of the local distributing plant and have no relation to appellant's pipe line department. They are served under the schedules and at the rates prevailing for the consumers served by the distributing plant within the limits of the adjacent municipality (Transcript of Record, p. 191).

To sum up what has been said so far, it may be stated that appellant, a Delaware corporation having its general offices and principal place of business in the City of Shreveport, Louisiana, is engaged in Arkansas in the following classes of business:

1. It transports gas through its transmission lines from Louisiana into Arkansas and at the city gate of the Cities of Hot Springs and Camden delivers it to a local distributing corporation which in turn takes the gas into its distributing system for sale and distribution to local consumers. The gas so delivered to the local distributing corporation in each case is transported, sold and delivered on the basis of a written contract between appellant or its predecessor and the local distributing corporation, previously entered into in the State of Louisiana, fixing the terms, prices, etc., upon which the gas is sold.

2. It transports gas through its transmission lines from Louisiana into Arkansas and in Arkansas delivers it to some forty industrial plants located along and adjacent to its main transmission pipe lines and beyond the limits of any town or city, for use as fuel in their industrial operations. In regard to these customers the record shows (a) that appellant has never held itself out to sell any and all industries, but only such as it can economically serve and make satisfactory arrangements with; (b) that sales are made in each case only under and in pursuance of a

written contract between the appellant or its predecessor and the industry, first entered into in the State of Louisiana; (c) that deliveries are made only through taps on the transmission line or, when necessary, through a spur constructed therefrom especially to connect with the premises of the industry; (d) that the gas is not treated after its arrival in Arkansas, and that the only reduction of pressure incident to and accompanying such sales is such as is necessary to permit of the gas being metered to the customer; (e) that the volume of gas transported into Arkansas is controlled by appellant's dispatchers in Louisiana, who are familiar with the requirements created under the contracts between appellant and its customers, and who upon that basis estimate and determine in advance the volume of gas to be turned into the pipe lines; (f) that the gas does not come to rest or remain in storage in the pipe line in Arkansas, but moves in a continuous stream from its source in Louisiana until it is delivered to the various customers; (g) that the periodical payments due by industrial customers for gas sold them are made in Louisiana.

(3) In 55 towns and cities in Arkansas appellant owns and operates local distributing plants, by means of which local consumers in such cities and towns are directly served with gas through intermediate, subsidiary and low pressure mains and service pipes. Adjacent to and around but beyond the corporate limits of these cities and towns there are in the aggregate some 318 rural domestic customers who are served with gas in the manner above described through the agency of the respective local distributing plants, and who are treated in each instance as the customers of the local distributing plant in the adjacent municipality.

The schedules applicable to all of the cities and towns in which the local distribution plant is owned and operated by appellant, and applicable to the rural domestic customers served in connection with each such distribution plant, have been filed in accordance with General Order No. 13 of

the Department of Public Utilities (Transcript of Record, p. 128), and the class of business described in the preceding paragraph, numbered (3), is not here involved and will not be discussed further. Appellant, however, believes and contends that its delivery and sale of gas to pipe line industrial customers, described in paragraphs numbered (1) and (2), constitute interstate commerce beyond the power of the Department to regulate, and has declined to file with the Department schedules showing the rates and terms upon which gas is sold by it to such customers.

On November 4, 1935, appellant was cited by the Department of Public Utilities to appear and show cause why it had not filed schedules and rates for gas sold and delivered to its pipe line industrial customers (Transcript of Record, p. 21). Appellant filed with the Department its response to the citation, setting forth that the transportation, sale and delivery of gas to such customers constitute interstate commerce beyond the jurisdiction of the Department to regulate (Transcript of Record, p. 22). A hearing was had before the Department, at which was made up the record of testimony and exhibits contained in the printed record, and on April 30, 1936, the Department entered a finding of fact and order finding that appellant's sales to its pipe line customers constitute intrastate commerce and ordering appellant to file with the Department within thirty days schedules covering all gas sold and delivered to such customers in Arkansas. In the making of this order the Department acted in pursuance of its supposed authority under Section 11 of Act 324 of the Acts of the General Assembly of Arkansas for the year 1935, the Act creating the Department and defining its powers and jurisdiction. The finding appears at pp. 186-203 of the Transcript; the order at p. 204. The statute referred to is not questioned or involved. However, for the convenience of the Court, in the appendix appearing at the end of the brief we have printed paragraph (a) of Section Eight, Section Eleven and the first paragraph of Section Nineteen thereof.

Thereafter, in accordance with the Act, appellant filed with the Circuit Court of Pulaski County, Arkansas, a petition to review the Department's order. In that petition appellant pleaded that the sale, transportation and delivery of natural gas from Louisiana to its pipe line industrial customers in Arkansas constitute interstate commerce, that in the conduct of such business it is not subject to regulation by the State of Arkansas or its Department of Public Utilities, and that "the finding and order of the Department of Public Utilities are in all things erroneous and that the order is unlawful and void; first, because it is in violation of and contrary to Section 8 of Article I of the Constitution of the United States * * *" (Transcript of Record, pp. 4, 8). The case was tried by the Pulaski Circuit Court without a jury upon the transcript of the record before the Department. At the trial appellant filed written request for certain findings of fact and certain declarations of law, all of which were granted by the Circuit Court. The first five findings of fact and the first four declarations of law appear in the Transcript at pages 212 to 214 and pages 218 to 220. The findings and declarations follow:

FINDINGS OF FACT

No. 1.

The court finds that the gas involved in this case which is delivered and sold by Arkansas Louisiana Gas Company to its pipe line industrial customers in Arkansas and to the local distributing corporations which it serves in Arkansas is produced in Louisiana and transported therefrom into Arkansas through high pressure transmission mains, and that the said gas flows in a continuous stream through the said mains from the point of production in Louisiana until delivered into pipes or distributing systems of the said industrial customers and local distributing corporations.

No. 2.

The court finds that Arkansas Louisiana Gas Company sells and delivers said gas to each of its pipe line industrial customers in the State of Arkansas and to each local distributing corporation which it serves in said State, under the terms of a special written contract previously entered into between Arkansas Louisiana Gas Company and said customers fixing the price at which and terms under which the said gas is to be delivered, and that each of said contracts contemplates the transportation of gas across State lines for its fulfillment. The court further finds in this connection that the periodical payments made by said customers for gas delivered to them under said contract are made in the State of Louisiana.

No. 3.

The court finds that when the gas is withdrawn from the transmission line and delivered into the pipes of the industrial purchaser and of the local distributing corporation in Arkansas it is necessary to measure the amount so withdrawn by meter, and to reduce the pressure of the gas from what it was in the transmission line. That the measurement of the gas and reduction of pressure is for the purpose of assisting in its delivery to the purchaser and is incidental thereto.

No. 4.

The court finds that Arkansas Louisiana Gas Company maintains at all times in the State of Louisiana employees known as gas dispatchers, whose duty it is to control the movement and volume of the gas transported from Louisiana into Arkansas through the company's main transmission lines. In this connection, the court further finds that the gas dispatchers are acquainted with the contracts between Arkansas Louisiana Gas Company and its pipe line industrial custom-

ers and local distributing corporations in Arkansas and with the requirements for gas created by such contracts, and that said requirements are taken into consideration by said gas dispatchers in determining the amount of gas to be transported into Arkansas.

No. 5.

The court finds that, with the exception of gas delivered to the plants of Arkansas Power & Light Company at Little Rock and at Pine Bluff, all gas delivered by Arkansas Louisiana Gas Company to its pipe line industrial customers in the State of Arkansas and to the local distributing corporations which it serves in Arkansas is delivered and passes directly from the main transmission line, or from a spur or lateral which taps said line, into the said customer's own pipes or distribution system. The gas so delivered into the customer's pipes or system is metered and its pressure reduced only at the point and time of delivery.

Gas is sold and delivered by Arkansas Louisiana Gas Company to its pipe line industrial customers only in large volume and for their industrial uses.

With the exception of the plants of Arkansas Power & Light Company in the Cities of Little Rock and Pine Bluff, all of the pipe line industrial customers to which gas is sold and delivered by Arkansas Louisiana Gas Company are situated beyond and without the limits of any town or city in Arkansas.

DECLARATIONS OF LAW

No. 1.

The transportation by Arkansas Louisiana Gas Company of gas from the State of Louisiana and delivery thereof in Arkansas by said company to its industrial pipe line purchasers, under special contract

with each such purchaser, constitutes interstate commerce and by reason of Section 8, Article I of the Constitution of the United States is not subject to regulation by the State of Arkansas or by its Department of Public Utilities.

No. 2.

The transportation by Arkansas Louisiana Gas Company of gas from the State of Louisiana and delivery thereof in Arkansas by said company to local distributing corporations, which said corporations distribute gas locally in cities or towns, under special contract with each such corporation, constitutes interstate commerce and by reason of Section 8, Article I of the Constitution of the United States is not subject to regulation by the State of Arkansas or by its Department of Public Utilities.

No. 3.

The order entered by the Department of Public Utilities of the State of Arkansas on April 30, 1936, requiring Arkansas Louisiana Gas Company to file with the Department within thirty days from and after said date schedules in the form and of the date required by General Order No. 13 of said Department, covering all gas sold and delivered by Arkansas Louisiana Gas Company to its pipe line industrial customers in Arkansas is in violation of Section 8, Article I of the Constitution of the United States and is therefore void.

No. 4.

The order entered by the Department of Public Utilities of the State of Arkansas on April 30, 1936, requiring Arkansas Louisiana Gas Company to file with the Department within thirty days from and after said date schedules in the form and of the date re-

quired by General Order No. 13 of said Department, covering all gas sold and delivered by Arkansas Louisiana Gas Company to local distributing corporations, which said corporations distribute gas locally in cities or towns in Arkansas, is in violation of Section 8, Article I of the Constitution of the United States and is therefore void.

Thereafter the Circuit Court entered its final judgment granting the prayer of appellant's petition for review and vacating and setting aside the order of the Department of Public Utilities (Transcript of Record, p. 16).

An appeal from the judgment of the Pulaski Circuit Court was perfected by the Department of Public Utilities to the Supreme Court of Arkansas, and the Supreme Court of Arkansas on June 28, 1937, rendered its opinion holding that appellant in the transportation, sale and delivery of gas from Louisiana to its pipe line industrial customers (those described hereinbefore in paragraphs numbered (1) and (2)) is engaged in intrastate commerce and that the Department's order of April 30, 1936, is not violative of Section 8, Article I of the Constitution of the United States. On the same day the Supreme Court entered its judgment reversing the judgment of the Pulaski Circuit Court with directions that the petition for review filed in that Court be overruled and that appellant comply with the Department's order. The opinion of the Supreme Court of Arkansas appears in the Transcript at page 223, *et seq.*, and the judgment of the Court appears at page 222. Appellant thereafter seasonably filed with the Supreme Court of Arkansas a petition for rehearing, which was entertained and taken under submission by the Court, which on October 4, 1937, entered an order denying it (Transcript of Record, pp. 238, 242).

In concluding this statement it should be noted that the record in various places shows that a small amount of natural gas is produced by appellant in certain fields in

North Arkansas known as the Clarksville fields. With the exception of a small amount delivered and distributed in the City of Little Rock, all of the Clarksville gas is sold and distributed north of Little Rock to local distributing plants and companies. None of the Clarksville gas was ever transported or distributed south of Little Rock. During the pendency of the proceeding before the Department of Public Utilities the distribution plant at Little Rock was acquired by appellant, which took over its operation and now operates it. Schedules were duly filed with the Department for all sales of the Clarksville gas, and, as shown by the stipulation at p. 15 of the Transcript of the Record, that gas is not an issue in the case. As shown by the stipulation, all of the gas sold and delivered by appellant to its pipe line industrial customers and to the local distributing corporations at Camden and Hot Springs is produced and purchased in Louisiana. This litigation does not involve the sale of any gas produced in Arkansas.

It should be further noted that in the printed record reference is occasionally made to appellant's sales of gas to Arkansas Power & Light Company. Appellant does sell and deliver to Arkansas Power & Light Company, at its generating stations in the Cities of Little Rock and Pine Bluff, Arkansas, gas for fuel purposes. The Arkansas Power & Light Company, which purchases under contract, was originally classed in general as an industrial customer. However, it receives its gas through the pipes of the local distributing systems in Little Rock and Pine Bluff and is, therefore, not a "pipe line customer." Appellant has, therefore, complied with the requirements of the Department of Public Utilities so far as its sales to Arkansas Power & Light Company are concerned and those sales are not an issue in this case. The Arkansas Power & Light Company is treated not as a pipe line industrial customer but as a customer of the local distributing plants at Little Rock and Pine Bluff.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellant's assignment of errors was incorporated with its petition for appeal to this Court and prayer for reversal. The errors assigned appear on pages 246 and 247 of the Transcript. The six assignments are interrelated and bear directly upon the question as to whether appellant's transportation and sale of gas to its pipe line industrial customers constitute interstate commerce. Our argument will, at least in general, be based upon all of them, and we accordingly specify all six assignments. The assignment of errors is as follows:

1. The Supreme Court of Arkansas erred in holding that the gas produced and purchased in Louisiana by Arkansas Louisiana Gas Company and transported, sold and delivered by it to its pipe line industrial customers in Arkansas, and to the local distributing corporations in the Cities of Hot Springs and Camden, Arkansas, does not flow in a continuous stream through Arkansas Louisiana Gas Company's transmission mains from the State of Louisiana until the same is delivered to the said pipe line industrial customers and the said distributing corporations in the State of Arkansas; and the Supreme Court of Arkansas erred in holding that the transportation, sale and delivery of said gas to the said pipe line industrial customers and local distributing corporations in Arkansas does not constitute a continuous unbroken chain, fundamentally interstate from beginning to end.

2. The Supreme Court of Arkansas erred in holding that the delivery by Arkansas Louisiana Gas Company to its customers in Arkansas of gas produced and purchased in the State of Louisiana and transported into the State of Arkansas is similar to the breaking of an original package after the commodity has been shipped into Arkansas, and that for that rea-

son the transportation, sale and delivery of such gas by Arkansas Louisiana Gas Company to its pipe line industrial customers in Arkansas and to the local distributing corporations at the Cities of Hot Springs and Camden, Arkansas, constitutes intrastate commerce. The holding of the Supreme Court of Arkansas ignores the fact that the gas so transported, sold and delivered to such industrial customers and local distributing corporations in Arkansas is transported and delivered to each of them under a special contract of sale entered into between Arkansas Louisiana Gas Company and each of such customers prior to the sale and delivery of any gas, each of which said contracts contemplates the transportation of such gas across State lines.

3. The Supreme Court of Arkansas erred in holding that the transportation, sale and delivery by Arkansas Louisiana Gas Company of gas produced and purchased in Louisiana to its pipe line industrial customers in Arkansas constitutes intrastate commerce and as such is subject to regulation by the State of Arkansas and its Department of Public Utilities. The Court erred in not holding that such sale, transportation and delivery constitutes interstate commerce and that as such it is protected by Section 8, Article I of the Constitution of the United States, against regulation by the State of Arkansas or its authorities.

4. The Supreme Court of Arkansas erred in holding that the transportation, sale and delivery by Arkansas Louisiana Gas Company of gas produced and purchased in Louisiana to the local distributing corporations at the Cities of Hot Springs and Camden, Arkansas, constitutes intrastate commerce and as such is subject to regulation by the State of Arkansas and its Department of Public Utilities. The Court erred in not holding that such sale, transportation and delivery constitutes interstate commerce and that as such it

is protected by Section 8, Article I of the Constitution of the United States, against regulation by the State of Arkansas or its authorities.

5. The Supreme Court of Arkansas erred in holding that the order entered by the Department of Public Utilities of the State of Arkansas on April 30, 1936, requiring Arkansas Louisiana Gas Company to file with said Department schedules covering all gas sold and delivered by Arkansas Louisiana Gas Company to its aforesaid pipe line or industrial customers in Arkansas, including the aforesaid local City distributing corporations, is valid, and erred in not holding that the said order of April 30, 1936, is in violation of Section 8, Article I of the Constitution of the United States, and therefore void.

6. The Supreme Court of Arkansas erred in reversing the judgment of the Pulaski Circuit Court and in directing that the petition for review of the order of the Department of Public Utilities be overruled and that Arkansas Louisiana Gas Company comply with said order by filing with said Department the aforesaid schedules; and erred in not affirming the judgment of the Pulaski Circuit Court.

SUMMARY OF POINTS AND AUTHORITIES

I

The Supreme Court of Arkansas erred in holding that the gas transported by appellant from Louisiana and sold and delivered to its pipe line industrial customers in Arkansas does not flow in a continuous stream through the transmission mains from Louisiana until it is delivered to the customers, and that the transportation, sale and delivery does not constitute a continuous chain interstate from beginning to end.

II

The fact that appellant distributes gas locally in Arkansas and is in such business subject to local regulation by the State does not affect the interstate character of its business of transporting and selling Louisiana gas to its pipe line customers, and does not subject that part of its business to State regulation.

Peoples Gas Co. v. *Public Service Commission*, 270 U. S. 550.

Pub. Utilities Commission v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83.

III

The transportation through pipe lines from one State to another and the delivery therefrom in the latter State of gas to local distributing corporations and to industrial customers along the pipe line constitute interstate commerce free from State regulation.

Okla. v. *Kans. Natural Gas Co.*, 221 U. S. 229.

Pub. Utilities Commission v. *Landon*, 249 U. S. 236.

Missouri v. *Kansas Gas Co.*, 265 U. S. 298.

Peoples Gas Co. v. *Pub. Service Commission*, 270 U. S. 550.

Tax Com. v. *Interstate Nat. Gas Co.*, 284 U. S. 41.

State Com. v. *Wichita Gas Co.*, 290 U. S. 563.

Crenshaw v. *Arkansas*, 227 U. S. 329.

Stewart v. *Michigan*, 232 U. S. 665.

State ex rel. Cities Service Gas Co. v. *P. S. Commission*, 85 S. W. (2d) 890.

State ex rel. Pipe Line Co. v. *P. S. Commission*, 93 S. W. (2d) 675.

Pa. Gas Co. v. *P. S. Commission*, 252 U. S. 23.

East Ohio Gas Co. v. *Tax Com.*, 283 U. S. 465.

State v. *Flannery*, 96 Kans. 372.

Southern Natural Gas Corp. v. *Alabama*, Vol. 81, No. 13 L. Ed. Advanced Opinions, Supreme Court of U. S., p. 695.

U. S. Glue Co. v. *Oak Creek*, 247 U. S. 321.

Atlantic Lumber Co. v. *Commission*, 298 U. S. 553.

Ozark Pipe Line Co. v. *Monier*, 266 U. S. 555.

Cheney Bros. Co. v. *Massachusetts*, 246 U. S. 147.

IV

The original package doctrine is not applicable to pipe line transportation and delivery of interstate gas.

Re Pa. Gas Co., 122 N. E. 260.

Baldwin v. *Seelig*, 294 U. S. 511.

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.

Commission v. *Attleboro Steam & Electric Co.*, 273 U. S. 83.

V

The transportation and delivery of gas to each pipe line industrial customer is made in pursuance of a written contract which contemplated transportation across State lines. The contract of sale in each case and the transportation and delivery of gas in fulfillment thereof constitute interstate commerce.

Rearick v. *Pennsylvania*, 203 U. S. 507.

Stewart v. *Michigan*, 232 U. S. 665.

Sonneborn Bros. v. *Cureton*, 262 U. S. 506.

Danhnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

Federal Trade Com. v. *Trade Assn.*, 273 U. S. 53.

State ex rel. Cities Service Gas Co. v. *P. S. Commission*, 85 S. W. (2d) 890.

Atlantic Coast Line Ry. Co. v. *Standard Oil Co.*, 275 U. S. 257.

VI

The fact that the gas when placed in the pipe line system in Louisiana is not ear marked for any particular customer in Arkansas is not material.

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265.

Commission v. *Attleboro Steam & Electric Co.*, 273 U. S. 83.

Danhnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

Mo. v. *Kans. Gas Co.*, 265 U. S. 298.

VII

El Dorado Area.

ARGUMENT

I

The Supreme Court of Arkansas erred in holding that the gas transported by appellant from Louisiana and sold and delivered to its pipe line industrial customers in Arkansas does not flow in a continuous stream through the transmission mains from Louisiana until it is delivered to the customers, and that the transportation, sale and delivery does not constitute a continuous chain interstate from beginning to end.

The argument herein contained is covered by Assignment of Error No. 1.

Before proceeding with the general argument, we desire to point out and correct a fundamental error of fact into which the Supreme Court of Arkansas fell; an error or misconception of the facts which very evidently influenced the Court's decision. As a test for determining whether appellant's transportation and delivery of gas to its pipe line industrial customers in Arkansas constitute interstate commerce, the Court considered the question whether "the transportation, sale and delivery constituted an unbroken chain from beginning to end." The Court resolved the question in the negative, saying "* * * but they do not" (Transcript of Record, p. 236).

To support its conclusion the Court then made certain factual statements (Transcript of Record, pp. 236-237) which are entirely without support in the record and clearly erroneous.

For example, after saying (p. 236) that an initial force of from 75 to 170 pounds per square inch must be exerted to set in motion and maintain the supply of gas in the 1,000 miles of pipe line in Arkansas and that "booster" (compressor) stations have been built along the route to keep the pressure constant, it is then said by the Court that "at all times there is a supply of gas in the 1,000 miles of mains. This reserve is estimated to be about 50 million cubic feet or an amount sufficient to meet requirements for several hours." This statement would imply that there is at all times a supply of gas estimated to be about 50 million cubic feet stored in the mains. The implication is wholly in error and was based upon an equally erroneous statement appearing in the finding of facts of the Department of Public Utilities. The evidence as to this was contained wholly in the testimony of J. C. Hamilton, and his testimony was that there could never be more than 50 million feet of gas in the entire system, which extends into Louisiana and Texas as well as Arkansas (Transcript of Record, page 79). The testimony is all to the effect, as shown by the record page references in the preceding state-

ment of the case, that no gas is ever stored or comes to rest in the pipe line system, but that it is in continuous motion from the time it is put into the pipes in Louisiana until it is delivered to the customer in Arkansas. For example, there are along the system eleven compressor stations (Transcript of Record, p. 103), and the "main purpose of these compressors is to keep the gas in a constant and steady flow, keep it moving" (Transcript of Record, p. 104). On page 104 of the Transcript it is shown that the gas continually moves until it is delivered to the meters of the customers and distribution plants in Arkansas. And when asked whether any of the gas is in storage at any time the witness stated "it would depend upon the definition of the word 'storage.' If it is storage in the sense of rest, it is not; it is continually moving." The testimony referred to here and in the preceding statement of the case is entirely undisputed, and there is nothing in the record upon which to predicate the finding or assumption that there is ever at any time a gas reserve kept at rest and in storage in the pipe lines.

In the same connection it is stated in the Court's opinion (Transcript of Record, p. 237) that change of density in the gas in the pipe lines due to expansion or contraction caused by weather conditions, or the temporary shut down of a large customer, might affect continuity of supply and demand, under which circumstances gas put into the mains in Louisiana might be indefinitely delayed before reaching the customer or customers to whom it is destined in Arkansas, and might therefore remain in storage facilities to be gradually consumed.

As just pointed out, the record shows that no gas is stored in the pipe line. It is constantly in motion and there are no storage facilities. Moreover, there is no proof in the record, nor was any contention made that such conditions as imagined by the Court have ever affected the transportation and flow of gas from its source to the customer, and it is too well settled to need citation of author-

ity that, in determining the continuity and unbroken character of the transportation and delivery, customary day by day operations and conditions must be considered instead of conditions that are so rare as to exist principally in one's imagination.

On pages 236 and 237 of the record, as a reason for denying continuity and unbroken character to the transportation and delivery, the Supreme Court somewhat elaborately points out that no particular gas pumped into the lines in Louisiana can be labeled as the identical gas thereafter delivered to a designated customer in Arkansas, since the nature of the commodity precludes such identification. This is only the repetition of the familiar argument, which we will deal with hereafter, that because no particular portion of the gas when placed into the mains in the State of origin can be ear marked as the identical portion that will be delivered to a particular customer in the State of destination, the transportation, sale and delivery of the gas do not make a continuous unbroken chain and cannot constitute interstate commerce. This argument, if sustained, would have made impossible the decisions of this Court in the many cases hereinafter cited in which it has been uniformly held that the transportation of natural gas from one State into another, and its sale and delivery from the pipe line in the latter State to customers therein, constitute interstate commerce.

II

The fact that appellant distributes gas locally in Arkansas and is in such business subject to local regulation by the State does not affect the interstate character of its business of transporting and selling Louisiana gas to its pipe line customers, and does not subject that part of its business to State regulation.

We repeat that the case at bar involves only pipe line transportation and sale of gas. In such tranportation and sale appellant engages in only two classes of business: (1)

The sale, transportation and delivery from Louisiana of gas to local distributing corporations at the city gates of Camden and Hot Springs in pursuance of contracts previously entered into; and (2) the sale, transportation and delivery of gas from Louisiana to some forty industrial customers in Arkansas at their plants along or adjacent to the transmission lines, in pursuance of contracts previously entered into. These customers are situated in rural territory outside the limits of any town or city, and none of them receive their gas through or from any local distribution plant or system.

The only issue in the case is whether the sale, transportation and delivery of gas to the customers above referred to constitute interstate commerce. If so, the State of Arkansas through its Department of Public Utilities has no right to regulate or control the business.

It is true that to a considerable degree appellant is engaged in Arkansas in the local distribution of gas. It owns and operates the local distributing plants in many cities and towns in Arkansas, and by means of such plants locally distributes and sells gas on demand to the inhabitants thereof; and in connection with the local distribution of gas in such towns and cities it distributes gas to rural domestic consumers living adjacent thereto, numbering in all approximately three hundred. In the conduct of such business, appellant is, of course, operating locally and is subject as a public utility to local regulation.

But the Supreme Court of Arkansas in its opinion has sought to treat as a unit the two classes of business (pipe line sales and local distribution). By laying undue emphasis upon the number of so-called taps made upon appellant's transmission lines in Arkansas, and by pointing out the number of times each transmission line may be tapped before gas arrives at the city gate of any local distribution corporation or at the meter of any industrial pipe line customer, the Court considers the entire business as

a whole; and it draws the unwarranted conclusion that the transportation and delivery to pipe line industrial customers and local distributing corporations is merely an incidental part of the whole, and should be treated as local intrastate business and therefore subject to local regulation.

The conclusion by no means follows. Appellant can at the same time engage in both intrastate and interstate business. It is a matter of common knowledge that many corporations engage in both interstate and intrastate business in the same State. Railroads, express companies and others are obvious examples. In such cases, while the State may by proper regulation control the intrastate part of the business, it has no right to regulate, control or burden that part of the business which is interstate. The principle has been so long settled by the decisions of this Court that it is unnecessary to go into any extended citation. It is only necessary to cite the cases of *Peoples Gas Company* v. *Public Service Commission*, 270 U. S. 550, and *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U. S. 83.

In the case first cited it appeared that the Gas Company engaged in selling and delivering gas locally through distribution plants owned by it in many towns and cities in Pennsylvania, and that at Johnstown only it sold and delivered its gas to a local distributing corporation, which latter corporation distributed and sold it locally. The greater part of the Gas Company's business in Pennsylvania was, therefore, local; but nevertheless it was held that in the transportation, sale and delivery of West Virginia gas to the local distribution corporation at Johnstown the company was engaged in interstate commerce. Since in that case it appeared that the company produced locally in Pennsylvania enough gas to supply Johnstown, without resort to gas produced in West Virginia, it was held that the order of the Pennsylvania Commission, upon which the appeal was based, was valid; but no room is left

for doubt as to the Court's opinion respecting the West Virginia gas, the Court saying:

> "As respects the West Virginia gas we are of the opinion, in view of its continuous transportation from the places of production in one State to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the State boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business."

The Attleboro case involved the sale of electric current by the Narragansett Electric Lighting Company to the Attleboro Steam & Electric Company. The Narragansett Company, a Rhode Island corporation, engaged in manufacturing, distributing and selling locally in the State of Rhode Island electric current for heating, light and power. Over 97% of the electricity manufactured by it was distributed locally in that State. The Attleboro Company, a corporation engaged in distributing electricity in the City of Attleboro, Massachusetts, purchased its electricity from the Narragansett Company under a contract in pursuance of which the current was delivered by the Narragansett Company to the line between the two States, where it went into the lines of the Attleboro Company and was transported to Attleboro. The Narragansett Company, becoming dissatisfied with the rates fixed by the contract, applied to the Rhode Island Commission to cancel them and establish increased rates, and the Commission after a hearing took jurisdiction and granted the application. On certiorari this Court held that the sale and delivery of electricity by the Narragansett Company to the Attleboro Company constituted interstate commerce, and that the rates were not subject to regulation by the Rhode Island Com-

mission. In response to the argument that 97% of the Narragansett Company's business was local to Rhode Island and constituted intrastate commerce, it was said:

> "Nor is it material that the general business of the Narragansett Company appears to be chiefly local, while in the *Kansas Gas Co.* case the Company was principally engaged in interstate business. The test of the validity of a State regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the State because this may be the smaller part of its general business."

If the interstate business of the Narragansett Company, a Rhode Island corporation, chiefly engaged in local operations within that State, could not be regulated by Rhode Island, it can hardly be said that the interstate business of Arkansas Louisiana Gas Company, a Delaware corporation having its principal offices in Shreveport, Louisiana, can be regulated by Arkansas because of the fact that it does some local intrastate business in the latter State. Less than 3% of the Narragansett Company's business consisted of the interstate sale of electricity, the balance of its business being confined to Rhode Island; whereas more than 50% of the deliveries made by Arkansas Louisiana Gas Company in Arkansas consist of pipe line sales to local distributing corporations at the city gate and to industrial customers along and adjacent to the pipe line, all of which, we contend, is interstate. The fact that Arkansas Louisiana Gas Company engages in Arkansas in what is admittedly local *intrastate business* gives the State of Arkansas, accordingly, no power to directly burden or regulate that part of its operations constituting *interstate business*.

The only question before this Court, therefore, is whether the transportation and delivery by appellant of

Louisiana gas to its pipe line customers, consisting of local distributing corporations at the city gate and industrial customers along the pipe line, is interstate commerce. It matters not that it may be engaged in Arkansas in business that is local and intrastate.

III

The transportation through pipe lines from one State to another and the delivery therefrom in the latter State of gas to local distributing corporations and to industrial customers along the pipe line constitute interstate commerce free from State regulation.

The following discussion is covered by and applies to Assignments of Error numbered three, four, five and six.

The principle set forth in the caption immediately above has been settled by this Court in a long line of decisions which can be found in the cases of *Oklahoma* v. *Kansas Natural Gas Company*, 221 U. S. 229, *Public Utilities Commission* v. *Landon*, 249 U. S. 236, *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 223, *Missouri* v. *Kansas Gas Company*, 265 U. S. 298, *Peoples Gas Company* v. *Public Service Commission*, 270 U. S. 550, *Tax Commission* v. *Interstate Natural Gas Company*, 284 U. S. 41, *State Commission* v. *Wichita Gas Company*, 290 U. S. 563.

In *Missouri* v. *Kansas Gas Company, supra*, it was said:

> "But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve
> • • •.

"The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

In *State Commission* v. *Wichita Gas Company, supra,* it is said:

"But the sale, transportation and delivery of natural gas by the pipe line company to the distributing companies constitutes interstate commerce and therefore the State is without power to prescribe rates or prices to be charged therefor."

The cases cited not only establish that the transportation of natural gas through pipe lines from one State into another and its delivery in the latter State to local distributing companies constitutes interstate commerce, but they also establish the fact that the setting of a meter at the point of delivery to each of the customers and a regulator with which to reduce the pressure at point of delivery is merely an incident to an interstate transaction, and that it in no way changes its character. In *State Tax Commission* v. *Interstate Natural Gas Company, supra,* it was shown, just as in the case at bar, that it was the practice of the pipe line company to set a meter at the point of delivery to the customer for measuring purposes, and a regulator with which to reduce pressure. In that connection, the Court, speaking through Mr. Justice Holmes, used the following language:

"The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff which is the only way in which it can be meas-

ured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi."

We note this point only in view of the testimony in the record to the effect that it is necessary for appellant to maintain meters at points of delivery, and regulators by means of which the pipe line pressure is in each case considerably reduced when the gas passes through the meter and into the distribution systems of the pipe line customers.

It must be conceded that the transportation of gas from Louisiana by appellant and its delivery in Arkansas to local distributing corporations constitute interstate commerce beyond State regulation. We submit that the same conclusion follows as to gas transported by appellant from Louisiana and delivered by it to its industrial customers along the transmission line. There are some forty of these customers in Arkansas. They are industrial and manufacturing concerns which purchase gas in large volume for their fuel requirements. None of them are located within the limits of any city or town, and none of them take their gas off of a local distribution plant or system. The gas is delivered from the main transmission line to them,—sometimes through a spur constructed directly from the transmission line to the premises of the plant, is reduced as to pressure and metered in the same way physically and mechanically as it is in the case of a local distributing corporation. The customer takes the gas from the transmission line into its own distribution system and no diversion of the gas into separate streams takes place until it is delivered into the customer's system. Whatever reduction in pressure is necessary in order to permit the passage of the gas from appellant's line into the customer's system is merely an incident to the sale and in no way affects the character of the business. In every case the

gas is transported and delivered to the industrial customer in fulfillment of the terms of a contract previously entered into between it and appellant.

There is, therefore, no essential difference between transportation and delivery of gas to a local distributing corporation and transportation and delivery to an industrial pipe line customer. In both cases the gas is transported from Louisiana to fulfill a written contract previously entered into contemplating its transportation and delivery, and the physical operation is the same.

The delivery and sale of gas to the pipe line industrial customer is entirely unlike the business of maintaining a local distribution plant and selling gas therefrom upon demand to local consumers. Such a plant requires the maintenance of a system of low pressure mains under the streets and an intricate system of small supply pipes to carry the gas to local consumers, and involves the maintenance of a local plant as well as local dealing and relations with private consumers, all of which constitute a local business or occupation distinct and by its very nature different from the production and transportation of gas into the State and its sale to an occasional pipe line customer. For that reason the cases of *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 23; *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465; *State* v. *Flannery*, 96 Kans. 372, and like cases relied upon by the Supreme Court of Arkansas have no application, for they deal not with pipe line sales but with the local sale and distribution of gas through local plants in towns and cities.

Pennsylvania Gas Company v. *Publice Service Commission* and *East Ohio Gas Company* v. *Tax Commission*, taken together, represent the final development of the Court's position as to local distribution of gas in towns and cities. In the first case it was held that the transmission from another State and distribution by a pipe line company of natural gas directly to consumers in a city of the

regulating State was interstate commerce, but that the actual distribution to local consumers within the city was sufficiently local in nature to permit of State regulation, the Court saying that "the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid * * * the service is similar to that of a local plant furnishing gas to consumers in a city."

In the East Ohio Gas Company case, the Court went a step further and held that local distribution to consumers in a city or town was local and not interstate commerce. The same result was reached in both cases, the reasoning being carried a step further in the later case. The ultimate decision in both, however, rests upon the same basis. In the East Ohio case the decision of the Court, just as in the Pennsylvania Gas Company case, rests primarily upon the fact that the maintenance and operation of a local distribution plant in a town or city, and the delivery of gas through an intricate system of relatively tiny low pressure pipes laid under the streets and under the premises of consumers, is a local business in itself, as distinguished from the production and transportation of gas from one State into another through a system of high pressure lines. Indeed, the Court in that case describes a local system as follows:

> "But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed."

The cases just referred to did not involve the transportation and delivery from transmission lines of interstate gas to local distributing corporations or to pipe line industrial customers located adjacent to or near the lines. Such deliveries differ very materially from the case where the pipe line company itself maintains a local distributing plant in a city or town, containing a relatively large number of low pressure distributing mains and supply pipes laid under the streets and consumers' premises. The maintenance of a net work of low pressure lines and supply pipes which make up the distribution plant itself, constitutes the local exercise of corporate functions and the maintenance of a local business. These conditions do not exist where the pipe line company, in the course of transporting gas from another State, sells it under contract to an industrial pipe line customer located along or adjacent to the transmission lines, and beyond the corporate limits of any city or town, any more than they do in the case where the pipe line company sells its gas to a local distributing corporation.

There is no essential difference in pipe line transportation and sale,—whether the transportation and sale be to a local distributing corporation at the city gate or whether it be to a pipe line industrial customer along the transmission mains. In both cases the transportation and delivery are in pursuance of a contract contemplating transportation of gas across State lines, and in both the physical operation, as to delivery and metering of the gas to the customer, is the same. It is true, that in case of sale to the local distributing corporation the gas is purchased for re-sale, whereas the pipe line industrial customer purchases the gas for its own use. The point however does not merit serious consideration. It has never been held that in order to constitute a transaction in interstate commerce the commodity transported must be purchased by the vendee for resale. No such test has ever been applied. The motive with which the vendee purchases an article transported from another State is immaterial in determining its char-

acter as interstate commerce. In a large percentage of interstate purchases the commodity is purchased by the vendee for his own use and consumption, and not for re-sale.

In *Crenshaw* v. *Arkansas*, 227 U. S. 329, stoves and ranges shipped into Arkansas in fulfillment of orders previously given for them were sold and delivered to the purchasers for their own use and not for re-sale; but the transactions were held interstate commerce and beyond State control. The same is true of *Stewart* v. *Michigan*, 232 U. S. 665. Many other cases might be cited, but we regard it as unnecessary.

We submit that the decisions above referred to settle not only that appellant's transportation and sale of Louisiana gas to local distributing corporations constitutes interstate commerce, but also that its transportation and sale of Louisiana gas to the forty industrial customers involved herein is interstate commerce; and that both types of business are free from State regulation. The above is the interpretation that has been placed upon those decisions by the Supreme Court of Missouri in the cases of *State ex rel. Cities Service Gas Company* v. *Public Service Commission*, 85 S. W. (2d) 890, and *State ex rel. Panhandle Pipe Line Company* v. *Public Service Commission*, 93 S. W. (2d) 675.

In the first case the Cities Service Gas Company (called pipe line company in the opinion), a Delaware corporation producing and gathering gas in Texas, Oklahoma and Kansas, transported it through its pipe lines into Missouri, where it sold it at the city gate to many local distributing corporations in cities and towns. It also under and in pursuance of contracts with twelve industrial customers located outside of any city or town, delivered and sold to them a portion of the gas so transported. The case was instituted by the Missouri Commission to determine whether the pipe line company was acting as a public utility in the sale of industrial gas in Missouri. The Commission held that it was so acting and ordered it to file the contracts upon which

it was supplying its industrial customers. The testimony in the case was very similar to the testimony in the case at bar, it being shown that gas was sold to industrial customers in "wholesale" quantities, by which was meant large quantities, since the gas was not resold. It was also shown that the considerations entering into the making of contracts with the industries were the same as in this case, it being stated that if a satisfactory contract could be made the pipe line company would supply gas, but that if not, it would refuse. The same contentions were made as in the case at bar, the Commission relying upon the cases of *East Ohio Gas Company* v. *Tax Commission, supra,* and *Pennsylvania Gas Company* v. *Public Service Commission, supra,* but the Court in an opinion in which all of the applicable cases are referred to, unanimously held that the transportation and sale of gas to the twelve industrial pipe line customers constituted interstate commerce and was beyond the regulatory power of the State Commission. The following language is worthy of quotation:

> "One of the main pipe lines of the company runs from the State of Kansas to the City of Sedalia in this State. From this main pipe line a lateral pipe line runs north to the City of Lexington, where the gas is delivered to the distributing company for resale to domestic consumers of that city. In oral argument of this case in this Court the Commission admitted the delivery of gas to the distributing company in Lexington was interstate commerce, and the gas in that instance did not become intrastate commerce until it reached the distributing pipe lines of that company for resale to the domestic trade. But in arguing this case, the Commission contends that if an industry was served in the vicinity of Warrensburg, the interstate movement ceased at the point that the gas left the main pipe line and entered the lateral pipe line that served the industry. *In both instances there was a previous contract with the Pipe Line for the sale of the gas be-*

fore it left the foreign State and it was delivered direct to the purchaser in this State without any storing or holding to be served on demand. We can see no distinction in these two instances mentioned. Both are interstate commerce.

"In the case at bar, the only reasonable inference to be drawn from the evidence is that the gas is delivered from the foreign State directly to the industrial consumers in this State *in compliance with a contract that was in existence between such consumer and the Pipe Line.* We think it is immaterial whether the Pipe Line owns all or part of the lateral pipe line that the gas passes through from the main pipe line to the industry, as it was a continuous movement. It therefore follows that under rules announced in the East Ohio Gas Co. case, *supra,* and *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co., supra,* that the Pipe Line was engaged in interstate commerce when it was delivering gas to the 12 industries and that the Commission does not have jurisdiction on account of other questions hereinafter discussed." (Italics ours.)

In *State ex rel. Panhandle Pipe Line Company* v. *Public Service Commission, supra,* the same Court unanimously approved the decision in the case just discussed, and held that the construction by the pipe line company of a lateral pipe line and measuring station for the purpose of effecting delivery of gas to an industrial plant was a mere incident to interstate business and not subject to local regulation.

The decision of the Supreme Court of Missouri is directly in point in the case at bar; and we submit that the reasoning upon which it is based and the conclusion drawn therefrom is not only sound but flows directly and inevitably from the decisions of this Court.

The Supreme Court of Arkansas, in its opinion, quotes from the opinion of this Court in the case of *Southern Nat-*

ural Gas Corporation v. *Alabama*, decided April 26, 1937, Vol. 81, No. 13, L. Ed., advanced opinions, p. 695. But the facts in the two cases differ so fundamentally that the decision in the *Alabama* case cannot constitute a precedent. The question in the *Alabama* case was as to the validity of a franchise tax sought to be levied by the State upon foreign corporations, which was construed as a tax on the exercise of corporate functions, or on the privilege of exercising corporate functions, within the State. The decision did not involve an attempt by the State to regulate the sale or distribution of gas. The pipe line company, although producing in Louisiana and Mississippi the gas which it transported into and through Alabama, made Birmingham, Alabama, its headquarters for the transaction of business, where the entire management and control of its business in all of its aspects was conducted, and where all of its contracts for sale of gas were made. The company's commercial domicile was in Alabama. It had four customers in Alabama, three of which were intrastate utilities engaged in the distribution of natural gas as public utilities, and the fourth of which was the Tennessee Coal, Iron & Railroad Company, which purchased gas for itself and affiliated companies operating plants in the Birmingham district. It was only the sale and delivery of gas to the Tennessee company and its subsidiaries that was discussed. The sale of gas to the three intrastate utilities was not involved or passed upon, and was not held to be intrastate commerce.

The manner in which the gas corporation sold and delivered gas to the Tennessee company differs entirely from the manner in which appellant sells and delivers gas to its industrial Pipe Line customers. The gas corporation constructed and maintained a local distribution system of service pipes along, across and over the premises of the Tennessee corporation and between it and its subsidiaries, through which the gas corporation distributed gas to the corporation and its subsidiaries as and when needed. A local distribution system of service lines, regulators and

all of the equipment incident thereto was maintained by the gas corporation for the special purpose of supplying the Tennessee Company and its subsidiaries, and the operation of the system was conducted in Alabama at Birmingham, where the headquarters and entire management of the gas corporation's business were located and where it performed its corporate functions, where the contract between the two companies was executed, where orders for gas requirements for itself and subsidiaries were from time to time given by the Tennessee company and received by the gas corporation, and where payments for gas were periodically made by the Tennessee company. Under the above circumstances the Court held that the gas corporation had established its commercial domicile within and was subject to a franchise tax levied by the State of Alabama upon the exercise of corporate functions within that State.

The case at bar arises upon an entirely different state of facts. Appellant maintains its general offices and headquarters in Shreveport, Louisiana, where the management of its business is located; where all of its contracts for the sale of gas to its pipe line customers in Arkansas are made; where collections from the sales of gas to such customers are received, and where orders and notice of gas requirements by such customers must be given and transmitted. Appellant's commercial domicile is in Louisiana and not in Arkansas. Gas is delivered by appellant to its pipe line customers in a very different manner from that in which it was delivered in the Alabama case to the Tennessee corporation. Appellant's pipe line customers receive their gas from appellant's transmission lines or from a spur built therefrom to the customer's premises. The delivery of gas by appellant to such customers ends at the outlet side of the meter on the customer's premises, from which point it passes into the pipes of the customer, who distributes it to his various points of consumption through his own distribution system. No local distribution system is maintained by appellant for any pipe line customer.

Again, as we have above pointed out, the Alabama case involved the validity of the imposition of a franchise tax upon the gas corporation, whereas the case at bar involves a direct attempt to regulate the sale of gas as to prices, rates, etc. In that respect the cases involve fundamentally different questions, for it is settled that certain types of taxes may be laid by the State upon corporations although the latter are partially or wholly engaged in interstate commerce, the theory being in the cases where the tax has been sustained that it does not impose a direct burden upon interstate commerce but only affects it indirectly. It was settled in *United States Glue Company* v. *Oak Creek*, 247 U. S. 321, that a State may impose a net income tax upon corporations engaged in interstate commerce, provided the receipts therefrom are not unduly discriminated against, and in that connection it was said in regard to franchise taxes:

> "Again, in *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 163, the court upon a review of numerous previous cases laid down certain propositions as established, among them these: * * * that the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to State taxation, provided at least the franchise be not derived from the United States."

In the case of *Atlantic Lumber Company* v. *Commission*, 298 U. S. 553, one of the main authorities relied upon and quoted from by Mr. Chief Justice Hughes in the Alabama case,—it appeared that the appellant a Delaware corporation, maintained its principal office in Massachusetts where its entire management was situated and where it performed all of its corporate functions. Its activities in Massachusetts consisted in the taking and accepting of orders for lumber, which were filled by the shipment of lumber from other States into Massachusetts, no stock of lumber being kept in the latter State; the only tangible prop-

erty in Massachusetts being appellant's office furniture, equipment and salesmen's automobiles. That the sales of lumber were purely interstate commerce was not questioned. Yet a franchise tax imposed by Massachusetts was sustained, based upon the fair value of the capital stock of the corporation according to the ratio of that employed in Massachusetts. The tax was sustained upon the theory alone that the corporate activities of the company were all performed and transacted in Massachusetts, the Court saying, "The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected."

In the opinion in the Atlantic Lumber Company case, Mr. Justice Sutherland discussed the case of *Ozark Pipe Line Company* v. *Monier*, 266 U. S. 555, and pointed out that in the Ozark case the pipe line company really engaged in no commerce (in the ordinary sense of that term) whatever in Missouri. It transported oil from Oklahoma to Illinois through a pipe line which ran through Missouri. In Missouri no oil was taken out of the pipe line nor any sales or deliveries made. The Company therefore in Missouri was engaged only in *transportation* and all of its activities in that State were linked exclusively to and were in furtherance only of such transportation. "Thus," Mr. Justice Sutherland says, "the burden of tax which the State imposed fell upon *interstate transportation* immediately and directly, while here the effect upon interstate commerce so far as there is any is remote and incidental—a distinction which in respect of such legislation as we are now considering marks the line between a tax which is valid and one which is not." (Italics ours.) The explanation of the decision in the Ozark case, accordingly, is that the Ozark Company was engaged in Missouri, only in interstate transportation, upon which the tax would have fallen directly.

The Ozark case, therefore, is not authority that a franchise tax cannot be laid by a State upon a corporation exclusively engaged in interstate commerce therein if the cor-

poration conducts its corporate functions within the taxing State. On the contrary, *United States Glue Company* v. *Oak Creek, supra, Cheney Bros. Company* v. *Massachusetts,* 246 U. S. 147, and *Atlantic Lumber Company* v. *Commissioner, supra,* are authority that such a tax can be so levied since it creates only an indirect burden on interstate commerce.

It may therefore be said that the applicable decisions of this Court lend support to the statement that, (1) a franchise tax is regarded as only an indirect burden upon interstate commerce; (2) that such a tax may be imposed by the State upon a corporation engaged in interstate commerce where the corporation, although foreign, maintains its headquarters and has established its commercial domicile within the State, and (3) that the decision in the Alabama case should be predicated upon the fact that the corporation having established its headquarters and its commercial domicile in Alabama where it performed all of its corporate functions, was subject to a franchise tax based upon the exercise of its functions in that State, whether the character of its sales of gas was interstate or intrastate. The establishment of domicile and the performance of corporate functions constitute the doing of business within the State, and furnish the basis of the tax even though the sales of gas be wholly interstate. But, however that may be, we close the discussion of the Alabama case by repeating that the facts regarding the manner in which the Tennessee Coal & Iron Company was served were so different in every particular from those in the case at bar relative to the manner in which appellant sells its pipe line industrial customers, that the decision in that case is not in point here.

The case of *South Carolinia Power Company* v. *South Carolina Tax Commission,* 52 Fed. (2d) 515, was relied on in the court below by appellees, but when examined it is found that the facts therein completely differentiate the case. The case involved three power companies, one of

which produced and sold current in South Carolina; one of which produced current in South Carolina and transported it to another State, and the third of which produced and distributed some current in South Carolina and in addition thereto imported from Georgia into South Carolina current produced in Georgia. The question of interstate commerce arose in the case of the last mentioned company. The mechanical and physical operation of generating and distributing electri current presents an entirely different case from that at bar. It was stated by the Court that while electricity is produced at low voltage, it must for transmission over long distances be stepped up to very high voltage by a transformer; that all of the current transmitted from Georgia having been thus stepped up before transmission, must, when received in South Carolina, be stepped down again to low voltage. The Court then proceeds:

> "And this stepping up or stepping down is not a mere change produced in the current. It is the production of a new and different current. The principle of the transformer is that the current flowing in the wires coming into the transformer sets up an induced current in the magnetic core of the transformer; and this causes an induced current to flow in the wires going out of the transformer; * * * the current produced by induction in the transformer results from the use of the original current, but is not that current, just as current produced by steam results from the use of coal but is not the coal."

It is thus seen that the decision does not involve the delivery and sale of current passing in interstate commerce from Georgia into South Carolina. The current coming from Georgia was used to manufacture in South Carolina the low voltage current sold in that State, and it was this low voltage current—manufactured *locally*—upon which the tax was based. The remarks of the Court referring to the breaking up of current must be taken in connection with

those facts. We have here merely a case of the breaking up of current and the local conversion of the original current coming from Georgia into a new current of different voltage, which was manufactured and sold within the State of South Carolina:

> "And we think it equally clear that the tax imposed upon the sale of current does not burden interstate commerce as to current brought from without the State. The tax is not imposed on the high-voltage current which passes in interstate commerce. It is imposed on the low-voltage current which is sold to the consumer, and is an excise tax on the business of selling that current. The high-voltage current which comes into the State is not sold. It is used to induce in the transformer the low-voltage current which is sold."

Concluding this part of the brief we submit that the only conclusion to be drawn from the decisions above cited is that appellant in the transportation from Louisiana and delivery of gas under its contracts with its pipe line industrial customers and local distributing corporations is engaged in interstate commerce, and that the business is not subject to regulation by the Department of Public Utilities.

IV

The original package doctrine is not applicable to pipe line transportation and delivery of interstate gas.

The following discussion is covered by and applies to Assignment of Error numbered two.

The Supreme Court of Arkansas held that since the main transmission lines of appellant are tapped in many places in Arkansas before gas may reach the point where it is delivered to pipe line industrial customers and local distributing corporations, and since gas at each of these taps is diverted from the transmission line and delivered to the company's own local distribution plants and rural

domestic customers, this constitutes a "breaking of the original package" in Arkansas and that the original package having thus been broken the delivery of gas to pipe line industrial customers is not interstate commerce.

The original package doctrine is but one of the many tests that are applied in order to determine whether a transaction constitutes interstate commerce. Like other tests, it is improper where from the physical nature of the transportation or of the commodities transported it cannot be applied. Natural gas is a substance which cannot be confined to or transported in packages. The transmission main is not a package, and cannot appropriately be said to be broken in the sense that a container of ordinary commodities is so described. The main, or pipe line, on the contrary, is merely a transportation agency or medium over, or by means of which, gas is transported, in the same sense that a railroad track is the medium over which cars roll. The gas must be transported through the line in a continuous flow or not at all and cannot be diverted from or taken out of the line in packages. Accordingly, the original package test does not apply to deliveries from the transmission pipe line. This was pointed out by Mr. Justice Cardozo while an Associate Justice of the Court of Appeals of New York, in the case of *Re Pennsylvania Gas Company,* 122 N. E. 260. In that case it was held that the maintenance and operation by a pipe line company transporting gas from Pennsylvania into New York of a local distributing plant in a city in New York, and the supplying of gas on demand therein to local consumers, was a local business and subject to New York regulation; but in reaching his conclusion Mr. Justice Cardozo rejected the original package doctrine, holding it not applicable to transportation and delivery of gas, and placed his decision purely upon the ground that the operation of a local plant and the supply through it of gas to the many local consumers and inhabitants of the city was in itself a local operation. In speaking of the original package doctrine, he said:

"But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests. (Citing cases.) The telegram forwarded by the stock exchange in New York to the telegraph company in Boston, with the intention that the company shall transmit it to selected brokers, approved in advance by the exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices. *W. U. Tel. Co.* v. *Foster*, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006. The continuity of the transaction is not broken by the translation of the code message into English, by its transmission, thus translated, to subscribers, or even by the option, reserved by the telegraph company to refuse delivery to any one."

In the case of *Baldwin* v. *Seelig*, 294 U. S. 511, Mr. Justice Cardozo again said:

"The test of the 'original package,' which came into our law with *Brown* v. *Maryland*, 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. * * * There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided. * * * In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 225 N. Y. 397, 403; 122 N. E. 260."

In *Eureka Pipe Line Company* v. *Hallanan*, 257 U. S. 265, the pipe line company purchased oil from producers in West Virginia and transported it through a pipe line

into Ohio, where it sold and delivered it to local companies. The oil received from the producers in West Virginia was pumped into the pipe line in that State, but the pipe line company's contracts with the producers provided that the producers should have the right to order certain quantities of oil diverted from the pipe line and delivered to local destinations before it passed out of West Virginia and into Ohio; otherwise the oil, after being received and commingled with other oil in the pipe line, became subject to the pipe line company's control and passed into Ohio. It was contended on the part of West Virginia that owing to the right of producers to divert oil locally before it passed out of the State there was no way, when the oil was put into the pipe line, to tell what particular part of it would cross the State line and leave West Virginia. The Court held, however, that the business constituted interstate commerce and in that connection said, "There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the State line."

In the Attleboro case, *supra*, as heretofore pointed out, 97% of the electricity produced by the Narragansett Company in Rhode Island was diverted out of the line and distributed locally before the remainder ever reached its purchaser in Massachusetts, but nevertheless, the business in question was held to be interstate.

In both of the above cases, according to appellee's theory, the package was broken, but in both of them the transportation and sale were held to be interstate commerce. In most of the decisions heretofore cited, where gas was transported from one State and distributed and sold in another State to local distributing corporations, the transmission line in the latter State was, according to appellee's theory, broken and the gas diverted therefrom at the tap of each and every local distributing company. Many of the local distribution companies, therefore, received their gas after the transmission line had been tapped and the gas diverted therefrom in many places; yet this

Court in each case held that the transportation and delivery of gas to the local distributing companies constituted interstate commerce. In other words, the Court has obviously recognized the inapplicability of the original package doctrine to the transportation and *pipe line* sale of natural gas and has never applied it.

The only cases where sales of gas have been treated by this Court as the breaking of a package are *East Ohio Gas Co.* v. *Tax Commission* and *Southern Natural Gas Corporation* v. *Alabama, supra,* where the Court was dealing with the distribution and sale of gas through a local distribution system or plant. Appellant's delivery and sale to its 40 pipe line industrial customers in Arkansas is entirely unlike the operation of a local system. A local distribution plant consists primarily of a system of low pressure, intermediate lines (Transcript of Record, p. 119). Into these intermediate lines the gas at reduced pressure is passed from the main transmission line, and from the intermediate lines it is in turn further distributed through a system of even smaller service pipes, and at an even lower pressure, to the premises and houses of the local consumers (Transcript of Record, p. 120). A local distribution system is therefore a system of intermediate lines through which the gas is first taken out of the main transmission line at a lowered pressure, connected to which are the yet smaller supply pipes conveying the gas at a further reduced pressure to the premises of the consumers; the net-work of intermediate and supply pipes being accompanied and connected with regulator stations, valves, meters, etc., all set up for the service of consumers in a local area (Transcript of Record, p. 72).

When the gas passes from the main transmission line into such a system, it is, as observed by the Court in the East Ohio case, necessarily relieved of the pressure put upon it at the stations of the pipe line company and at which it passes through the main transmission line, its volume is expanded and it is divided into the many smaller

streams that enter the lines connecting the intermediate mains with the pipes on the consumer's premises. While the Alabama case did not involve a city or town distribution plant, it did involve a local distributing operation, since, as pointed out in the opinion, the gas corporation under its contract with the Tennessee company, which bought for consumption by itself and its subsidiary industrial plants, agreed to and did establish a system of service and supply lines over the premises of and to the various plants in order that gas might be furnished them in a manner suited to their needs; and the gas corporation operated and administered the system through its general offices at Birmingham where orders were from time to time received for the gas to be supplied through the service lines.

The delivery of gas by appellant to its pipe line industrial customers is not through an intermediate system of mains. On the contrary, the gas passes direct from the main transmission lines, or in some cases through a spur especially constructed therefrom, to the premises of the customer, where at the outlet side of the meter it is taken by the customer into his own distributing pipes. The pressure is reduced only at point of delivery to the customer and only for the purpose of permitting the gas to pass through the meter into the customer's pipes. The delivery is, accordingly, direct from the pipe line and not through an intermediate or subsidiary system of low pressure mains and supply pipes.

The transportation and delivery of gas to appellant's pipe line industrial customers is, therefore, an unbroken and uninterrupted operation, and this is the true test to apply in determining whether it constitutes interstate commerce, as was pointed out in *Re Pennsylvania Gas Company, supra*, where it was said:

"'If the normal, contemplated, and followed course is a transmission as continuous and rapid as science can make it * * *, it does not matter what are

the stages or how little they are secured by covenant or bond.' *W. U. Tel. Co.* v. *Foster, supra,* 247 U. S. at page 113, 38 Sup. Ct. at page 439, 62 L. Ed. 1006. The essential unity of the transaction remains the final test. *Swift & Co.* v. *U. S.,* 196 U. S. 375, 399, 25 Sup. Ct. 276, 49 L. Ed. 518; *Rearick* v. *Pennsylvania,* 203 U. S. 507, 512, 27 Sup. Ct. 159, 51 L. Ed. 295."

The transportation and delivery of gas to appellant's pipe line customers is as continuous and rapid as science can make it. There is no break in the continuous flow of the gas from the pumping stations in Louisiana to the taps of the local distributing corporations and pipe line industrial customers in Arkansas. The gas flows constantly in a continuous stream from the beginning to the end of its journey, notwithstanding that at certain points along the pipe line portions of it may be diverted for delivery to customers.

V

The transportation and delivery of gas to each pipe line industrial customer was made in pursuance of a written contract which contemplated transportation across State lines. The contract of sale in each case and the transportation and delivery of gas in fulfillment thereof constitute interstate commerce.

Another reason why the original package doctrine has no application to the case at bar is that gas is sold and delivered by appellant to each of its pipe line customers (local distributing corporations and industrial customers) only in pursuance of written contracts for its sale and delivery, under which terms, prices and minimum and maximum requirements are fixed, which contracts are entered into between appellant and each customer in the State of Louisiana prior to the transportation and delivery of any gas to the customer.

It has long been held by this Court that a contract which contemplates the transportation across State lines and de-

livery of a commodity in fulfillment thereof is of itself interstate commerce, and that the delivery of the commodity in fulfillment of the contract is a part of such commerce and is free from State regulation. In such cases the original package doctrine has no application, since the transportation of the commodity in fulfillment of the contract is itself merely the completion of an interstate transaction.

In *Rearick* v. *Pennsylvania*, 203 U. S. 507, where the State sought to impose a peddling tax upon the taking of orders for brooms to be shipped into Pennsylvania from another State, the State relied upon the contention that the brooms when delivered to the purchasers were not in the original package. Holding that the contention was not material, the Court, speaking through Mr. Justice Holmes, said:

> "But the doctrine as to original packages primarily concerns the right *to sell within* the prohibiting or taxing State goods coming into it from outside. When the goods have been *sold before arrival* the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale." (Italics ours.)

In the concluding sentence of the above quotation the Court, in remarking that it would consider whether the limitations upon State power might not still exist in cases "where there is no executed sale," was referring to the State's additional point, which was that title to the brooms did not pass until their delivery to the purchaser in Pennsylvania. The Court rejected the point, holding that the place and time of the passing of title was immaterial:

> "'Commerce among the several States' is a practical conception not drawn from the 'witty diversities' (Yelv., 33) of the law of sales. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399. The brooms were spe-

cifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce."

In *Stewart* v. *Michigan, supra,* a peddling tax was levied by Michigan upon the sale in that State of groceries and other merchandise. The defendant's practice was to obtain contracts from customers in Michigan for the sale of its goods, and after sufficient contracts had been assembled, to ship the goods in a car load lot into Michigan, consigned to itself. The car was then opened and its contents taken out by the purchasers. None of the goods were consigned to any particular person and they were not marked so as to be identified with any particular order. The containers were mixed promiscuously in boxes and each purchaser picked out a container containing the quantity and character of goods he had ordered. The Michigan court held that since there was no identification of the goods the transaction was not one of interstate commerce. This Court reversed the decision, saying:

> "The charge as thus given and affirmed is clearly in conflict with the rule announced in *Crenshaw* v. *Arkansas,* 227 U. S. 389, and the cases there reviewed. Indeed, reference to authority is unnecessary, since it was admitted in the argument at bar that the judgment below in so far as it affirmed the action of the trial court in holding that there could be a conviction because of the deliveries of merchandise from the cars to fill orders previously solicited and obtained was erroneous because in conflict with the commerce clause of the Constitution."

In the case of *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, Texas imposed a tax on receipts from sales of oil. The plaintiff, an oil dealer, engaged in shipping oil into Texas and selling it there. His business was two-fold:

(1) in some cases he shipped oil into Texas in original unbroken packages, which were stored in a warehouse and not sold until after they had reached the State; (2) in other cases, contracts for the sale of the oil had been made with purchasers in Texas before the oil was shipped into the State. It was held that the receipts from oil not sold until after it reached Texas constituted intrastate commerce and were subject to the State tax, although that particular oil remained in original packages until sold; but that the shipment and delivery into Texas of oil to fulfill contracts previously taken for its sale constituted interstate commerce, the receipts from which could not be taxed by Texas;—the Court saying:

> "Many of the sales by the appellants *were made* by them *before the oil to fulfill the sales was sent to Texas.* These were properly treated by the State authorities as exempt from State taxation. *They were in effect contracts for the sale and delivery of the oil across State lines.* The soliciting of orders for such sales is equally exempt. *Such transactions are interstate commerce in its essence* and any State tax upon it is a regulation of it and a burden upon it." (Italics ours.)

And again, at page 518:

> "If the orders for such sales in original packages were given before importation, the conclusion reached by the Court that they were protected against an excise or license tax is in accord with all of the cases already cited, *though the fact that they were delivered in the original packages would not give them any additional immunity.*" (Italics ours.)

Where commodities are not sold before being shipped into the State,—in other words, are shipped into the State for the purpose of being sold thereafter—then the doctrine of original package in some cases applies. But where a contract for the sale of a commodity is entered into before

the commodity is shipped, and the commodity is thereafter transported into the purchaser's State in fulfillment of the contract, the contract of sale, contemplating transportation across State lines, is in itself a transaction in interstate commerce and the right to deliver the commodity in fulfillment thereof attaches to and is incidental to it and is itself interstate commerce. Such transactions, as stated in the decision last cited, are interstate commerce in its essence, and it is not necessary to deliver the commodity in an original package in order to give it immunity from State regulation.

All of the gas transported from Louisiana into Arkansas and delivered to pipe line industrial customers and local distributing corporations is transported under the terms of a special contract previously entered into between appellant and the customer, which contract contemplates the transportation and delivery of gas across State lines. The contract is itself a transaction in interstate commerce and the delivery of the gas in fulfillment thereof partakes of the interstate character of the contract. The essential nature of the transportation and delivery of gas to the pipe line industrial customers is the same as its transportation and delivery to the local distributing corporations both physically and contractually, and if the one constitutes interstate commerce, which has often been held by this Court, the other does. This was the principle in the mind of the Missouri Court in *State* v. *Public Service Commission*, *supra*, when it said:

> "In oral argument of this case in this court the Commission admitted the delivery of gas to the distributing company in Lexington was interstate commerce, and the gas in that instance did not become intrastate commerce until it reached the distributing pipe lines of that company for resale to the domestic trade. But in arguing this case, the Commission contended that if an industry was served in the vicinity of Warrensburg, the interstate movement ceased at the point

that the gas left the main pipe line and entered the lateral pipe line that served the industry. *In both instances there was a previous contract with the Pipe Line for the sale of the gas before it left the foreign State* and it was delivered direct to the purchaser in this State without any storing or holding to be served on demand. We can see no distinction in these two instances mentioned. Both are interstate commerce." (Italics ours.)

In connection with the fact that the gas delivered to the pipe line industrial customers is transported and delivered to them in fulfillment of contracts calling for its transportation and delivery, it must be remembered, as shown by the record, that these contract requirements very largely determine and control the quantity of gas transported into Arkansas from Louisiana. The undisputed testimony shows that in Louisiana gas dispatchers directly control the movement of gas from that State into Arkansas, as well as the quantity of gas transported. These dispatchers are familiar with all of the contracts between the company and its pipe line customers, and with the quantity of gas that will be needed for their contract requirements. Upon the basis of these requirements they estimate and determine in advance the amount of gas to be transported into Arkansas. If an industrial contract customer intends to shut down his plant, the dispatchers must be notified in advance, and on the other hand, when the industry is about to resume its gas, they must again be notified. Gas is not dumped into the pipe in Louisiana and transported at random into Arkansas for the purpose of peddling on casual system demand. To the contrary, the gas is delivered to pipe line customers to satisfy contract requirements, and is as definitely appropriated to the fulfillment of those requirements as science permits.

Before the State Court much was said by appellees regarding the place where the contracts are entered into. They apparently were under the impression that we con-

tend that the execution of the contracts in Louisiana adds to the strength of our contention that the transaction constitutes interstate commerce; and they pointed out that in both *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, and *Federal Trade Commission* v. *Trade Association*, 273 U. S. 53, it was held that the transactions involved constituted interstate commerce, although in the one the contract was made in the State of origin, and in the other was made in the State of destination. In other words, that the two decisions referred to make no distinction, in determining whether a transaction is in interstate commerce, between the States where the contract is entered into,—i.e., the State of origin, or the State of destination.

Ordinarily, whether the contract is made in the State *from* which the goods are to be shipped, or in the State *to* which they are to be shipped, makes no difference: the contract, contemplating the shipment of goods across State lines, itself constitutes interstate commerce. We pointed out that all of Arkansas Louisiana Gas Company's contracts are made in Louisiana at its headquarters and principal offices, merely to remind that the domicile of the Company is in Louisiana where it performs its corporate functions. But, appellants could have called attention to no two cases more clearly illustrating the principle we contend for. In the Dahnke-Walker case, the contract for the purchase of grain was made in Kentucky,—the grain to be transported thence to Tennessee. The Court in commenting said:

> "'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 'contracts to buy, sell, or exchange goods to be transported among the several States' were declared 'part of interstate trade or commerce.' * * * In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the con-

trary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

Appellants have described the contracts under discussion as being merely requirement contracts. Just what is meant by the term "requirement contract" we do not know. Generally speaking, the contracts in question require the pipe line customer to take and Arkansas Louisiana Gas Company to furnish all of the customers' fuel requirements for a certain specified term. The contracts fix the prices and rates at which the gas is to be sold and the manner of its delivery. It is, of course, impossible to tell how much gas the customer will need for his requirements per year and for that reason a minimum quantity of gas is usually stipulated which the customer must take and pay for, or pay for if he does not take. The contracts, whether called requirement contracts or not, obviously contemplate the purchase, sale and delivery of a quantity of gas over a specified term. They are, of course, contracts of sale. If appellant refused to furnish gas for any causes other than those excepted in the contracts, it would be contractually liable for damages. If the purchaser refused to take, he would be contractually liable. Moreover, the contracts necessarily contemplate the transportation of gas from Louisiana into Arkansas in order to fulfill the contractual obligation resting upon appellant. It is obvious that the contracts themselves constitute interstate commerce; that the transportation and delivery of gas in fulfillment thereof constitutes interstate commerce, and that the original package test is in no way applicable.

In closing this part of the discussion, we desire to refer to *Atlantic Coast Line Railway Company* v. *Standard Oil Company*, 275 U. S. 257, a case cited by the Supreme Court of Arkansas as bearing upon the question under discussion. The case bears no similarity to the case at bar. The facts were that the plaintiff Standard Oil Company of Kentucky was engaged in selling locally oils and gasoline in the

State of Florida. It had contracts with several customers in Florida to supply their annual requirements of fuel oil. These contracts were filled from time to time by shipments made by the plaintiff from storage tanks maintained by it at Port Tampa and Jacksonville,—Florida ports, where the plaintiff maintained a large supply of fuel oil. The plaintiff produced no oil in Florida and in order to have on hand sufficient oil to meet its demands it purchased oil from the Standard Oil Company of Louisiana and the Standard Oil Company of New Jersey, both separate and distinct corporations. The oil purchased by the plaintiff from the Standard Oil Company of Louisiana was shipped by the latter from its refineries along the Mississippi, and the oil purchased from the Standard of New Jersey was shipped from Tampico, Mexico; and all of the oil so shipped was delivered to the plaintiff and unloaded by it into its tanks at the two Florida ports, where the shipments ended and where title passed to the plaintiff company.

After receiving into its tanks at the Florida ports the oil so purchased from the Standard of Louisiana and Standard of New Jersey, the plaintiff customarily then transported and delivered it by tank car to its local Florida customers. These shipments were from Port Tampa and Jacksonville to the interior points where the customers were located. The question in the case arose over the freight rate to be charged for these local shipments. The plaintiff insisted that the transportation by it of oil from the Florida ports to its customers in Florida should be considered as a part of a continuous journey from the Mississippi River and from Tampico, and therefore as an interstate journey. The defendant railroad company contended that the interstate transportation ended with the delivery of the oil to the plaintiff at the ports of Tampa and Jacksonville; and that the shipments by plaintiff from those ports to its customers in the interior of Florida were separate intrastate shipments which should take an intrastate rate. There was no other question in the case.

The Court held that when the oil was delivered by the Standard Companies of Louisiana and New Jersey to the plaintiff on the coast of Florida and put into the latter's tanks at the port, the interstate transaction was complete; that the oil upon its delivery at the port became the property of the plaintiff (Kentucky Company), and that its transportation by that company from the port to its customers in Florida was a separate transaction and purely an intrastate shipment. There was no sale of any kind by the Standard Companies of Louisiana and New Jersey to *the customers of the Kentucky Company in Florida*. The only contract made and fulfilled by the Standard of Louisiana and the Standard of New Jersey was the contract each of them had with the Standard of Kentucky. They had no contracts with the customers of the Standard of Kentucky.

Accordingly, the only interstate sale and transportation in the case was the sale and transportation of oil by the Louisiana and New Jersey Companies from the Mississippi River and Tampico to the Florida port and its delivery there to the purchaser, Standard of Kentucky. Its subsequent delivery by that company to its customers in Florida was purely an intrastate transaction. The contracts considered by the Court were between the Standard of Kentucky, operating locally in Florida, and its customers in Florida, and they involved only the transportation of oil from Tampa and Jacksonville to interior points in that State. The only contracts of sale that contemplated interstate movements were, as pointed out, the contracts between the Standard Companies of Louisiana and New Jersey on the one hand and the Standard Company of Kentucky on the other, and they were not involved in the case.

As was stated by Chief Justice Taft, "there is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers" (Standard Oil Companies of Louisiana and New Jersey) "beyond the primary seaboard storage of the plaintiff" (Kentucky) "company

at Port Tampa, Jacksonville or the St. John's River terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

The question under discussion in this part of the brief, —the effect upon transportation of contracts contemplating interstate sale of commodities—was not involved in the case and was not discussed by the Court. The case is therefore not applicable.

VI

The fact that the gas when placed in the pipe line system in Louisiana is not ear marked for any particular customer in Arkansas is not material.

The Supreme Court of Arkansas concluded that the failure to earmark or segregate any of the gas when placed in the pipe line system in Louisiana, for delivery to any particular customer in Arkansas, prevents it from moving in and being a part of interstate commerce. But gas from its very nature is incapable of being earmarked for any particular destination or customer. It is a quasi-fluid substance and no one molecule can be segregated from another. It is impossible to identify any particular quantity of gas in a pipe line. This is implied in all of the decisions heretofore cited. In many of them gas was transported from one State to another and in the latter delivered to a large number of local distributing corporations. In all of the cases it was obviously impossible to earmark the gas when placed in the pipe line for delivery to any particular one of the local companies to which it was to be delivered in the State of destination: nevertheless, in all of them the Court held that the transaction constituted interstate commerce and was not subject to local regulation. In *Eureka Pipe Line Company* v. *Hallanan, supra,* all of the oil was

produced in West Virginia and in that State placed in a pipe line extending into Ohio. The producers however, reserved the right to divert quantities of oil from the pipe line while still in West Virginia and before it crossed into Ohio. Manifestly, it was impossible to segregate any quantity of oil when put in the pipe line in West Virginia and to say it was to be delivered in Ohio. Yet the Court held that all of the oil delivered in Ohio was the subject of interstate commerce. In the Attleboro case, *supra*, the greater part of the electricity produced in Rhode Island was diverted for use in that State before it passed into Massachusetts. It was impossible to earmark that part of the electricity which was to be transported into Massachusetts. But the Court held that the transportation of that part which did reach Massachusetts was interstate commerce and not subject to local regulation. In *Dahnke-Walker Milling Company* v. *Bondurant, supra,* none of the grain purchased in Kentucky for shipment into Tennessee could be earmarked as destined for any particular customer in the latter State. But again the Court held that its purchase and transportation was interstate commerce, free from State interference.

As heretofore remarked in discussing the original package doctrine, such considerations cannot apply to the interstate transportation and delivery of gas. From the very nature of the substance transported, the only true test is that of continuity, that is to say, continuous movement from the time the gas is placed in the pipe line in the State of production until its delivery to the customer in the State of destination. To repeat what was said in *Missouri* v. *Kansas Gas Company, supra:*

> "The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of regulation.

VII

El Dorado Area.

In the Court below much was said by counsel about the El Dorado area, which was described by them as containing a net work of lines serving industrial customers located in that section. A casual glance at the enlarged plat of that area inserted as a part of the map incorporated in Exhibit No. 4 (Transcript, p. 136A), does indicate a concentration of pipe line industrial customers greater than that exisiting in any other like area in the State. However, it must be remembered that while the map does not so show, yet the El Dorado area comprises at least 300 square miles. The enlarged section itself was copied from a map originally appearing in a gas and oil publication, and it was testified by Mr. Hamilton, and is undisputed, that the map is not drawn to scale and is therefore misleading. Mr. Hamilton further testified that some of the lines shown thereon have probably been abandoned and are not now in use, (Transcript of Record, p. 66).

While as compared with other sections of like area the industrial customers therein are more numerous, there is, of course, obviously no such density of customers as will be found in a local distributing system. There are only fourteen of them in the El Dorado area (Transcript, p. 82). They are served in the same manner as pipe line industrial customers elsewhere; that is to say, they are served under contract and off of the main transmission lines passing through that section and leading to the towns of El Dorado, Louann, Smackover, Norphlet and Junction City, all of which are in the area and in each of which there is a local distributing plant (Transcript, p. 67). They buy their gas in large quantities for their own industrial requirements in accordance with the terms of such contracts. There is no parallel between the sale of gas to these customers and the local distribution and sale of gas, which involves the construction and maintenance of an intermediate system and

of a system of low pressure service pipes communicating with the premises of the local consumers.

The service to the industrial customers in this area is contract service, contemplating the transportation of gas across the State line and its delivery from the transmission line to the customer. The gas is physically delivered to the customer just as it is to a city distributing corporation.

It follows that the transportation and sale of gas to each pipe line industrial customer in the El Dorado area constitutes interstate commerce. That being true, it is, of course, immaterial that in this particular area there are relatively many customers so served; otherwise we would be led to the somewhat remarkable conclusion that a mere multiplication of interstate customers can of itself change the character of each into a local customer. The statement, of course, refutes itself, since a mere increase in the volume of interstate commerce can hardly change it to local commerce.

CONCLUSION

It is submitted, *first*, that the Supreme Court of Arkansas erred in holding and deciding that the sale, transportation and delivery by appellant to the local distributing corporations at Camden and Hot Springs, Arkansas, of natural gas from Louisiana does not constitute interstate commerce. It is submitted, *secondly*, that the Supreme Court of Arkansas erred in holding and deciding that the sale, transportation and delivery by appellant to its pipe line industrial customers in the State of Arkansas of Louisiana gas does not constitute interstate commerce. It is submitted that the Supreme Court of Arkansas erred in not holding that appellant in the conduct of such business is engaged in interstate commerce and in its conduct is not subject to regulation by the State of Arkansas or its Department of Public Utilities.

For the above reasons we submit that the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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Counsel for Appellant.

APPENDIX

Act 324, Acts of Arkansas, 1935.

Section 8. (a) The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

Section 11. Under such rules and regulations as the Department may prescribe, every public utility shall file with the Department within such time and in such form as the Department may designate, schedules showing all rates established by or for it, and collected or enforced, or to be collected or enforced, within the jurisdiction of the Department.

The utility shall keep copies of such schedules open to public inspection under such rules and regulations and at such places as the Department may prescribe.

Section 19. The Department, upon complaint, or upon its own motion, shall, upon reasonable notice and after a hearing, have the power to:

(1) Find and fix just, reasonable, and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.